The Constitutional Framework Limiting Compelled Voice Exemplars: Exploration of the Current Constitutional Boundaries of Governmental Power Over a Criminal Defendant*

"Bills of Rights give assurance to the individual of the preservation of his liberty. They do not define the liberty they promise."[1]

"In a split decision, a three judge panel ruled that Richard Olvera's constitutional rights were violated when the trial judge ordered him to stand five feet from the jury and utter the bank robber's command, 'Give me all of your money' and, in Spanish, 'dame tu dinero.'"[2]

INTRODUCTION

In *United States v. Olvera*, the Ninth Circuit held that forcing Richard Olvera to repeat phrases heard by a witness during a bank robbery, for which Olvera was on trial, violated his guaranteed presumption of innocence.[3] The Ninth Circuit attempted to explain how the particular combination of facts and procedures in the *Olvera* case invoked constitutional protection. The court justified its ruling against an

---

* I would like to give special thanks to Professor Cynthia Lee and Justice Richard Huffman for their assistance on this Comment.

1. BENJAMIN N. CARDOZO, *The Paradoxes of Legal Science, reprinted in* SELECTED WRITINGS OF BENJAMIN NATHAN CORTEX 251, 311 (Margaret E. Hall ed., 1947).

2. Jim Doyle, *Judge's Order to Talk Leads to Reversal*, S.F. CHRON., July 28, 1994, at A23.

3. 30 F.3d 1195 (9th Cir.), *cert. denied*, 115 S. Ct. 610 (1994).

adamant dissent and set its decision apart from other factually analogous circuit court decisions.[4]

Olvera is just one example of the ongoing difficulties courts face in defining the constitutional boundaries of compelled evidence production and, in particular, compelled voice exemplars.[5] The courts must grapple with a number of constitutional and statutory issues, each of which might prohibit a particular exemplar under a particular set of circumstances. In addition, courts must balance important policy considerations applicable to compelled evidence situations. On the one hand, courts must recognize the important governmental interest in protecting the safety of the citizenry through conviction and incarceration of criminals, and the need to rely on witness identification for this purpose.[6] On the other hand, this interest must be tempered by the court's duty to protect and preserve the individual liberties on which the United States was built and continues to be based.[7]

Unfortunately, treatment of voice exemplar issues by modern courts seems to fall short of adequately protecting individual rights. The problem, in large part, is a result of the formal application of constitutional standards, instead of considering the actual effect of a particular state practice on individual rights. A trial court's decision to allow or prohibit a compelled voice exemplar in a case is not merely a procedural matter, and is potentially the most important decision the court makes in a trial.[8] The court's decision is of tantamount importance because of the particular effect that witness' identification testimony can have on the jury, especially if the compelled speech mimics words used at a crime scene.[9] The importance of the court's decision concerning an exemplar becomes clearer still once the complete ramifications of a court's decision to allow the exemplar are recognized.

---

4. *See id.*

5. A compelled voice exemplar is a particular word or series of words or phrases uttered by a defendant against his will, by command of the court.

6. However, the Supreme Court has not given carte blanche to the state to use witness identification testimony in all cases, noting that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." United States v. Wade, 388 U.S. 218, 228 (1967).

7. *Id.*; *see also* ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY 80 (1955) ("This country was built on individual liberty. It will never be saved in the long run by submerging individual rights in the quest for absolute safety for the state.").

8. *See* Carl McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 238 (1970) (faulty identifications may pose the "greatest single threat to the achievement of our ideal that no innocent man shall be punished").

9. *See* Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: an Analysis and a Proposal*, 79 KY. L.J. 259, 315 (1991).

If a voice exemplar is determined to be merely evidence, versus a constitutionally protected right, the defendant is placed between the proverbial "rock and a hard place." At that point, the defendant may be compelled by the state to give an exemplar mimicking any words the government tells the defendant to repeat.[10] The government's preference seems to be to have the defendant repeat the words allegedly stated during the commission of the alleged crime. These words tend to be threatening or menacing in nature, and requiring a defendant to repeat these words in court in front of the jury is conceivably the most prejudicial method of establishing a voice identification possible.[11] Despite this, the defendant does not even have the right to diminish the potential prejudice by offering a neutral[12] voice exemplar for identification purposes.[13] Even more troubling is the practice of allowing an exemplar to be compelled, despite the fact that the relevant witness has identified the defendant in court visually and has stated that a voice exemplar is unnecessary.[14] Such a practice places into doubt the actual reason for the compelled exemplar. Further, in all jurisdictions, the defendant's failure to produce the exemplar will be admissible as

10. *See* 2 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 6.5, at 251-55 (2d ed. 1986 & Supp. 1994).

11. Having the defendant utter threatening and menacing words places an aura of criminality around the defendant, strongly suggesting to the jury that the defendant is guilty. "It is hard for me to conceive of a more prejudicial method of establishing a voice identification." United States v. Brown, 644 F.2d 101, 107 (2d Cir.) (Oakes, C.J., dissenting), *cert. denied*, 454 U.S. 881 (1981).

12. Such a substitution cannot be made without court permission. *See In re* Grand Jury Proceedings, Hellmann, 756 F.2d 428, 431 (6th Cir. 1985). "Neutral" in this context refers to the words spoken, not the manner in which they are spoken. For example, a court might allow the defendant to read an article from a magazine in lieu of restating the phrases spoken during the commission of the charged criminal activity. The defendant's restating of menacing words in a non-threatening manner does not overcome the prejudice. The use of such words acts to recreate the scene of the crime in the minds of the jury and to put the defendant in that scene. The prejudice comes from this effect, not the tone of voice.

13. *Id.* (grand jury has broad discretion to compel verbatim voice exemplar and defendant's offer of a neutral exemplar does not constitute sufficient compliance).

14. State v. Locklear, 450 S.E.2d 516, 518 (N.C. Ct. App. 1994) (despite the witness' statement that no voice exemplar was necessary, the trial court's demand that the defendant provide an exemplar was still within its discretion); United States v. Leone, 823 F.2d 246, 250 (8th Cir. 1987) (despite fact that witness had already identified defendant, the forcing of the defendant to repeat words uttered during the commission of the crime did not violate defendant's rights).

probative evidence of consciousness of guilt,[15] even if the defendant chooses to exercise her right to remain silent.[16]

In contrast, the defendant is given no right to present a voice exemplar as evidence, in the absence of the defendant's testimony,[17] unlike other types of exemplar evidence which the defendant may offer without submitting to cross-examination.[18] The formal basis for such an inequity is that the defendant could easily fake a voice exemplar without penalty, since the prosecution would have no opportunity to expose the trickery through questioning.[19] However, the defendant is equally capable of faking a state compelled exemplar without being subject to cross-examination, a problem that has not yet been addressed by the courts. Under the trickery logic, state compelled exemplars should likewise be excluded.

Regardless, the disparate treatment of compelled exemplars ignores the real impact that the isolated performance of the exemplar will have on the trier of fact. The prosecution, by use of the state's judicial power, is allowed to force the defendant to repeat words allegedly said during a criminal activity, even if the defendant has exercised her constitutional right to remain silent. The defendant has no right to substitute neutral words or to use any other means to lessen the prejudice of this procedure. Yet, if a defendant wishes to volunteer a voice exemplar for witness identification purposes, she may do so only by abandoning her right to remain silent and by submitting to full cross-examination. In effect, the government is given all the benefits and none of the burdens,

---

15. 1 EDWARD J. DEVITT ET. AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.13, at 457-58 (4th ed. 1992 & Supp. 1994). While using the fact that a defendant exercised a right against that defendant would be unconstitutional under Griffin v. California, 380 U.S. 609 (1965), no such prohibition is applicable to exemplars as the defendant has no constitutional right to refuse to provide one. South Dakota v. Neville, 459 U.S. 553, 560-61 (1983).

16. United States v. Franks, 511 F.2d 25, 35-36 (6th Cir.) (upholding instruction that jurors could infer defendant's consciousness of guilt from his refusal to provide a court ordered voice exemplar), *cert. denied*, 422 U.S. 1042 (1975).

17. People v. Scarola, 525 N.E.2d 728 (N.Y. 1988). In *Scarola*, the prosection witness testified under cross-examination that the robber had no speech problems or unique voice mannerisms. *Id.* at 730. The defendant, who had a profound speech impediment, was nonetheless barred from offering a voice exemplar, unless he consented to be subject to complete cross-examination. *Id.* at 731; *see also* United States v. Esdaille, 769 F.2d 104, 107 (2nd Cir.), *cert. denied*, 474 U.S. 923 (1985) (due process does not require court to allow defendant with a heavy Caribbean accent to offer his voice as evidence because of the suspect nature of the exemplar).

18. *E.g.*, United States v. Bay, 762 F.2d 1314 (9th Cir. 1985) (trial court erred in refusing defendant's request to exhibit the tattoos on his hands to the jury after witness testimony that witness did not recall any distinguishing features about bank robber's hands).

19. *Scarola*, 525 N.E.2d at 733; *Esdaille*, 769 F.2d at 107-08.

because the same evidence that is allowed the prosecution is denied to the defense.[20]

The only recourse left to the defendant is to request that the witness be given multiple voice exemplars to choose from,[21] in an attempt to minimize the prejudice arising from the compulsion and the words used. However, the defendant has no absolute right to this protection.[22] In most cases, trial courts continuously refuse to allow any mitigating effort by the defendant,[23] despite the minimal disruptive effect of allowing the protection.[24]

This Comment seeks to provide a comprehensive guide to the current constitutional framework surrounding in-court compelled voice exemplars. The express purpose is to explore the current framework of United States jurisprudence concerning exemplars for use by legal practitioners in the criminal field. Part I addresses the self-incrimination privilege as applied to exemplars. Despite Supreme Court decisions that radically limit the application of the self-incrimination privilege, self-incrimination continues to have particularized application in protecting defendants from compelled evidence. More importantly, self-incrimination seems to be the most likely basis on which an exemplar would be prohibited, a fact reflected by the solitary focus of scholarly research on the privilege against self-incrimination when considering the constitution-

---

20. At least one court has recognized the implication of such disparate treatment, holding that if the state could have ordered the defendant to speak without violating constitutional guarantees, then principles of due process require that the defendant be allowed to provide non-testimonial speech without exposing himself to cross-examination. State of Louisiana v. Tillett, 351 So. 2d 1153 (La. 1977).

21. *See, e.g.*, United States v. Thoreen, 653 F.2d 1332 (9th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982) (counsel may request court permission to seat multiple people at defense table to test witness identification, but doing so without court's awareness may constitute criminal contempt).

22. *See, e.g.*, United States v. Davies, 768 F.2d 893, 903-04 (7th Cir. 1985) (refusal of defendant's request for an in-court identification lineup was not an abuse of discretion).

23. *Id.*; *In re* Grand Jury Proceedings, Hellmann, 756 F.2d 428, 431 (6th Cir. 1985) (grand jury refusal to accept a neutral voice exemplar was within its discretion); United States v. Edward, 439 F.2d 150 (3rd Cir. 1971) (trial court's refusal of defendant's request to sit among court spectators during testimony of identifying witnesses was not an abuse of discretion).

24. *See* United States v. Domina, 784 F.2d 1361, 1371-72 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987).

ality of compelled voice exemplars.[25] Additionally, defense counsel continue to argue the applicability of the privilege to the prohibition of exemplars. Thus, despite the current Supreme Court limitations on the application of the privilege against self-incrimination to exemplars, a full analysis of self-incrimination doctrine is essential to a complete analysis of constitutional limitations on state compelled exemplars.

Part II of this Comment considers the due process limitations the courts have applied to exemplars. Despite an ongoing dispute between the circuits as to whether due process acts to limit compelled exemplar situations, the Supreme Court has not yet provided guidance in this constitutional area. As with self-incrimination analysis, the historical foundations of due process are included because of their importance in consideration of the current application of constitutional rights.

Finally, Part III will briefly consider other constitutional and evidentiary limitations that have been argued, or might be argued, in the context of exemplars. Even though none of these has yet received wide recognition or support, each is worthy of consideration for its potential application in certain contexts, and as part of a complete study of the current constitutional boundaries of state compelled exemplars.

I. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AS A PROTECTION AGAINST STATE COMPELLED EVIDENCE AND EXEMPLARS

A. History

The origin of the privilege against self-incrimination is seen in the resistance against the judicial system of the Stuart monarchy,[26] which occurred in the early to middle seventeenth century. In particular, the notorious trial of John Lilburne,[27] in which the defendant's adamant

---

25. *See* Russell J. Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination*, 10 VAND. L. REV. 485 (1957).

26. *See, e.g.*, Weintraub, *supra* note 25, at 486-89; John H. Wigmore, *The Privilege Against Self-Crimination; Its History*, 15 HARV. L. REV. 610, 624-26 (1902). One of the most striking of the methods was the *ex officio* oath, utilized by the ecclesiastical courts in pursuit of enemies of the Established Church. A judge, by virtue of his office, had the authority to place a defendant under oath and proceed to interrogate him. This system allowed the Church, on mere suspicion alone, to compel anyone to provide proof against himself. DAVID FELLMAN, THE DEFENDANT'S RIGHTS TODAY 304-05 (1976).

27. Lilburne was accused of importing subversive books from Holland and of treason. Despite being jailed and severely beaten, he refused to take the oath. For a detailed discussion, see Harold W. Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213 (1952).

refusal to testify was ultimately recognized as legitimate by the court, has been focused on as the judicial origin point of the right against self-incrimination.[28] From the resistance movements of the 1630's and 1640's, the privilege continued to be recognized in England up through the Glorious Revolution period.[29]

Overall, criminal procedure in the American colonies mirrored criminal procedure under English common law, including the right against compelled self-incrimination.[30] By the mid-eighteenth century, the right was firmly established throughout the colonies.[31] In 1776, a self-incrimination clause was included in the Virginia Bill of Rights,[32] followed by similar inclusion of clauses in many other state constitutions.[33] Influenced by these examples, James Madison's drafting of the Fifth Amendment to the United States Constitution in 1789 included a guarantee against being compelled to "be a witness" against oneself.[34]

Recent historical studies of the privilege against self-incrimination have provided new insight into the actual role of the privilege.[35] This new approach recognizes the "tradition" of the privilege as addressed by

---

28. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 301-13 (1968).

29. *See id.* at 301-13.

30. *Id.* at 371-76.

31. *Id.* at 368-404.

32. THE BILL OF RIGHTS OF THE STATE OF VIRGINIA, 1776, § 8, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1909 (Benjamin P. Poore, 2d. 1878).

33. *E.g.*, A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE STATE OF PENNSYLVANIA, 1776, art. IX, *reprinted in* Poore, *supra* note 32, at 1541-42; CONSTITUTION OF MARYLAND, 1776, art. XX, *reprinted in id.* at 817-18; THE BILL OF RIGHTS OF THE STATE OF MASSACHUSETTS, 1780, art. XII, *reprinted in id.* at 958.

34. U.S. CONST. amend. V. Madison's use of the phrase "be a witness" differed from the terms used in the state constitutions at that time, phrases like "furnish evidence," "secure evidence," or "compelled to give evidence." *See, e.g.*, VIRGINIA BILL OF RIGHTS, 1776, art. VIII., *reprinted in* Poore, *supra* note 32, at 1909; VERMONT CONSTITUTION OF 1777, chap. I, art. X. *Id.* at 1860; MASSACHUSETTS CONSTITUTION OF 1780, art. XII. *Id.* at 958; DELAWARE CONSTITUTION OF 1792, § 7. *Id.* at 279. The Supreme Court disregarded claims that the different wording was intended for a different meaning, stating that the various state and federal provisions, "however differently worded, should have as far as possible the same interpretation." Schmerber v. California, 384 U.S. 757, 762 n.6 (1967) (quoting Counselman v. Hitchcock, 142 U.S. 547, 584-85 (1892)).

35. *But see* Richard H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962 (1990) (theorizing that the true origin of the privilege against self-incrimination is found in a blend of Roman and canon law).

Wigmore and Levy, but argues that the existence of the privilege was in form only.[36] The actual criminal procedure of common law England and colonial America did not, as a practical matter, allow an individual defendant to utilize the privilege.[37] Under English common law, the defendant could not compel witnesses on his behalf, nor was the defendant allowed the presence of counsel at the trial itself.[38] Likewise, many of the early colonial criminal procedural systems included these same limitations.[39] Therefore, as a practical matter, defendants had to speak in their own defense and respond to prosecutorial evidence as it was given within this procedural system.[40] A defendant's failure to speak in her own defense was tantamount to admitting unconditional guilt, as the trier of fact would be provided with no foundation on which to base a judgment of innocence. Thus, while the privilege against self-incrimination provided a formal procedural protection against governmental inquisitions,[41] the notion of asserting the privilege individually

---

36. *See, e.g.*, John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086 (1994).

37. The criminal procedure during this period has been categorized as the "accused speaks" trial system. Langbein, *supra* note 36, at 1054. This procedural system was depicted by Sir Thomas Smith in *De Republica Anglorum*, within the framework of a hypothetical trial circa 1565. THOMAS SMITH, DE REPUBLICA ANGLORUM, bk. 2, ch. 23, at 114 (1982) (1st ed. 1583). The trial depicts the defendant in a continuing confrontational dialogue with both the victim and the accusing witnesses. The defendant immediately responds to each item of evidence as well as to the questions posed to him by his accusers. *Id.*

38. This rule lasted until 1696 in cases of treason and until 1836 in cases of felony. 7 & 8 Will. III, c.3 (1696); 6 & 7 Will. IV, c.114 (1836). At least one historian has interpreted these limitations in a positive light instead of as limitations, extolling the momentous changes made to the English common law trial practice by the public at that time. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 386 (2d ed. 1936).

39. For example, the colony of Massachusetts Bay banned paid counsel in its courts altogether. A COPPIE OF THE LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND, 1641, clause 26, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 46, 50-51 (William F. Swindler ed., 1975). For a general discussion of pre-Constitutional American criminal procedure, see Moglen, *supra* note 36, at 1090-94.

40. John M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 223 (1991).

41. The intent of the privilege was to prevent implementation of inquisitorial legal systems like those of the ecclesiastical courts and of the Star Chamber. In essence, the privilege provides a barrier to state implementation of an oath system or any other legal framework in which the accused would be required to assist the state in compiling evidence of the guilt of the accused. Ullmann v. United States, 350 U.S. 422, 427 (1956); *see also* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

was unthinkable within the common law criminal system during this period.[42]

The traditional prohibition against counsel came into disfavor in the United States, and jurisdictions began to abandon the prohibition, primarily during the eighteenth century.[43] The presence of counsel in courtroom proceedings changed the dynamics of trial procedure and increased the potential applicability of the privilege against self-incrimination.[44] As a practical matter, the increase in the use of defense counsel was the impetus that brought the formal recognition and practical application of the privilege together.[45]

The addition of defense counsel changed the nature of trial proceedings by increasing the adversarial character of the system.[46] In an effort to zealously represent their clients, defense counsel began to focus on the "testing" of the prosecution's case and on narrowing the evidentiary sources available to the state.[47] The result was a divergence among the courts over whether the scope of the privilege included compelled evidence production or exemplars.[48]

B. The Role of the Courts

The actual application of the privilege against self-incrimination has been primarily the product of judicial construction.[49] The Court has

---

42. Moglen, *supra* note 36, at 1089.

43. *See* Beattie, *supra* note 40, at 226. Beattie found that the percentage of defense counsel appearances grew from 2.1% in the 1770's to 20.2% in 1786, and to 36.6% in 1795. *Id.* at 227 tbl. 1.

44. Langbein, *supra* note 36, at 1054; *see also* Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713 (1983).

45. *See* Langbein, *supra* note 36, at 1084; Moglen, *supra* note 36, at 1128-29.

46. Langbein, *supra* note 36, at 1070-71. For an analysis of the origin and growth of the adversarial system, see Landsman, *supra* note 44.

47. *Id.*

48. One legal scholar wrote that "[o]n these questions the authorities are in such conflict that it is impossible to lay down any thoroughly established rule." JOHN E. TRACY, HANDBOOK OF THE LAW OF EVIDENCE 151 (1952). Another interpreted the state of the law to be such "that an accused person cannot claim his privilege, when asked to rise or to uncover his face, [nor] the use of the personal effects of the accused as evidence," but that an accused person cannot generally be compelled to go farther than this. JOHN J. MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE 436 (3d ed. 1924).

49. *See id.*; Lisa Tartallo, Note, *The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End its Silence on the Rationale Behind the Contemporary Application of the Privilege*, 27 NEW

generally focused on its interpretation of the history and policies which constituted the impetus for the creation of the privilege.[50] Considering the formal affinity shown for the right, both in English common law and by the founders of the Constitution, one might expect an expansive application of the privilege in United States courts. In fact, in early court treatment of the privilege, a majority of the courts that recognized the existence of a privilege[51] utilized an expansive interpretative approach.[52] Still, a significant minority of early courts construed the privilege narrowly to include only content-based communications.[53] Further, Professor John Wigmore, in his first treatise on evidence, strongly advocated the narrow "testimonial" interpretative approach.[54]

In addressing the contradictory interpretations of the breadth of the privilege, the modern Supreme Court has adhered to the more narrow interpretation that the privilege against self-incrimination protects no

---

ENG. L. REV. 137 (1992).

50. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (the privilege is based on an unwillingness to subject those suspected of crime to the choice between self-accusation, perjury or contempt). The "core meaning" behind the privilege is the avoidance of the "cruel trilemma," a term which has been used to denote the impossibility of fairness within a legal system such as the Star Chamber. The defendant in such a system had three options, none of which were palatable. If the defendant remained silent, he would be punished for contempt. If he testified truthfully, the result would be self-incrimination and potential conviction on the substantive charge. And, if he testified falsely, he would be punished for perjury. Pennsylvania v. Muniz, 496 U.S. 582, 595-96 (1990); Daniel J. Capra, *Sobriety Tests and the Fifth Amendment*, N.Y. L.J., Nov. 9, 1990, (Evidence) at 3.

51. Before the United States Supreme Court held in *Malloy v. Hogan* that the Fifth Amendment privilege against self-incrimination applied to the states through the Fourteenth Amendment, several states allowed state prosecutors to comment on a defendant's failure to testify and permitted state courts to instruct jurors that they could draw inferences from a defendant's failure to testify. Adamson v. California, 332 U.S. 46 (1947) (prosecutor comments), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964); Twining v. New Jersey, 211 U.S. 78 (1908) (jury inferences), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964).

52. State courts tended to interpret the right expansively, prohibiting the state from requiring of a defendant any act that might tend to incriminate him. *See, e.g.*, Stokes v. State, 64 Tenn. 619, 621 (1875) (trial court prohibited from requiring defendant to place his foot in a pan of mud brought into court); Turman v. State, 95 S.W. 533 (1906) (court cannot compel defendant to don a cap); Reyes v. Municipal Court, 41 P.R. 892 (1931) (court cannot compel defendant to dishevel his hair). Likewise, the Supreme Court initially took a narrower view, holding, for example, that compelled production of documents violated privilege against self-incrimination. Boyd v. United States, 116 U.S. 616 (1886).

53. *See, e.g.*, People v. Gardner, 38 N.E. 1003 (N.Y. 1894); White v. State, 62 S.W. 749 (Tex. Crim. App. 1901); *see also* Magee v. State, 46 So. 529 (Miss. 1908) (Police officers have the right to acquire information from prisoners, even by force, and doing so does not violate privilege against self-incrimination).

54. JOHN WIGMORE, TREATISE ON EVIDENCE § 2263, at 3123 (1904).

more than testimonial communications. In *Holt v. United States*,[55] for example, the Court held that compelling a prisoner to try on clothing in court did not raise a self-incrimination issue.[56] Similarly, in *Schmerber v. California*,[57] the Court ruled that a compelled blood sample did not constitute testimony, and thus, no self-incrimination protection applied.[58] The repeated references in both *Holt* and *Schmerber* to Wigmore's treatise reflects the importance the Court placed on his work.[59] In fact, Justice Black, in his *Schmerber* dissent, openly criticized the Court for its over reliance on a single academic source and the Court's adoption of the "testimony" concept. Justice Black commented that even though "my admiration for Professor Wigmore's scholarship is great, I regret to see the word he used to narrow the Fifth Amendment protection play such a major part in any of this Court's opinions."[60]

Subsequent Supreme Court consideration of self-incrimination cases has continued to strictly limit the privilege to "testimony".[61] Based on the Court's belief that a verbal statement would almost always qualify as testimony, and thus fall within the privilege, the Court did not consider the testimony rule as a narrowing of the privilege.[62] However, in reality, the Court's belief has not been supported by any court decisions based on an issue of a compelled voice exemplar.

As a result, the state of the privilege against self-incrimination in modern American courts has been interpreted by at least one scholar as

55. 218 U.S. 245 (1910).
56. *Id.* at 252-53.
57. 384 U.S. 757 (1966).
58. *Id.* at 760-65.
59. *See id.* In considering Professor Wigmore's "testimony" theory distinction of the privilege, it is important to note his open disdain for the concept that self-incrimination should ever be protected against in modern society. Wigmore denoted the privilege as "a relic of controversies and dangers which have disappeared" and argued that an "innocent" person would never need to assert the privilege and that the guilty should not be entitled to it. *See* John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 85-86 (1891).
60. *Schmerber*, 384 U.S. at 774 (Black, J., dissenting).
61. "Testimony" has been defined as state compulsion of a defendant to disclose or communicate information of facts that might serve as or lead to incriminating evidence. Doe v. United States, 487 U.S. 201, 211 (1988).
62. *Id.* at 213-14.

"empty of meaning."[63] This conclusion seemingly goes too far in that it ignores, for example, the effectiveness of the privilege in mandating a grant of immunity to a witness from the state, prior to compelling the witness to incriminate herself.[64] Still, the current application of the privilege by courts is much more narrow than it was during the nineteenth century.[65]

C. *Modern Framework*

The Fifth Amendment privilege against self-incrimination has been divided into five general components, "allowing [(1)]natural persons [(2)]to prohibit the introduction in a criminal proceeding [(3)]of self-incriminating disclosures [(4)]that were obtained through 'compulsion' by the state and [(5)]that are testimonial in nature."[66] The United States Supreme Court has addressed, within a constitutional framework, each of these factors and clarified how the factors must be applied.[67]

Each of the first four factors will likely be satisfied in cases involving compelled voice exemplars. An individual criminal defendant will usually satisfy the first component per se. The Court has adhered to a narrow definition of "person," allowing only natural persons to assert a privilege against self-incrimination.[68] Still, any individual criminal defendant, as a natural person, can assert a privilege.[69] The second component, limiting the privilege to a criminal proceeding, has not been as narrowly construed. The Supreme Court has found the privilege to be applicable in any situation where incriminating testimony might be revealed and subsequently used in future criminal proceedings.[70] Because the exemplar procedure occurs during trial, the exemplar portion of a case will always fall within the "criminal proceeding" category.

---

63. George C. Thomas III, *Justice O'Connor's Pragmatic View of Coerced Self-Incrimination*, 13 WOMEN'S RTS. L. REP. 117, 117 (1991).

64. *See* Kastigar v. United States, 406 U.S. 441 (1972).

65. *See* MCKELVEY, *supra* note 48, at 436; Synopsis, *Privilege of Accused Against Corporal Examination*, 16 HARV L. REV. 300, 300 (1903).

66. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE, AN ANALYSIS OF CASES AND CONCEPTS §§ 15.01-15.02, at 323-24 (2d ed. 1986).

67. For a complete discussion of the five factors, see Tartallo, *supra* note 49, at 144-50.

68. Thus, a corporation, association, or partnership cannot assert a privilege with regard to the entity. Still, any individual member may assert his or her own privilege on statements which might act to incriminate them as individuals. *Id.* at 144.

69. The Supreme Court has interpreted the Fifth Amendment privilege as applicable only to the personal and private interests of individuals. United States v. White, 322 U.S. 694 (1944). Thus, the privilege is limited to instances when an individual person is being compelled to testify and when that testimony will incriminate that person.

70. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

The third element of "incrimination" is a fact specific question, but would be satisfied in the case of compelled exemplars, due to the broad definition given to "incrimination." Testimony will be considered incriminating whenever it might "furnish a link in the chain of evidence needed to prosecute."[71] Fourth, in the case of exemplars, the "compulsion" component is satisfied as a matter of course, as the exemplar situation arises only when the defendant is forced by the government with the permission of the court[72] to provide a voice exemplar.

Therefore, the fifth element of whether compelled evidence constitutes testimony is the crucial determinant, and as such has been frequently questioned. Based on the Supreme Court's adoption of the "testimony" distinction, "acts" have generally not been held to fall within the scope of the Fifth Amendment privilege. For example, courts have allowed a defendant to be compelled to reenact a crime,[73] dye her hair,[74] furnish a handwriting sample,[75] perform a sobriety field test,[76] wear an outfit or costume[77] and shave a beard or mustache.[78]

---

71. Hoffman v. United States, 341 U.S. 479, 486 (1951).

72. Of course, if the defendant freely volunteers to offer an exemplar, without any coercion or compulsion by the government, no constitutional right is implicated. *See* United States v. Washington, 431 U.S. 181, 187 (1977).

73. *E.g.*, Avery v. Procunier, 750 F.2d 444, 448 (5th Cir. 1985) (forced reenactment of a robbery at the crime scene upheld by appellate court as non-testimonial, though the court discouraged such procedures).

74. *E.g.*, United States v. Brown, 920 F.2d 1212, 1215 (5th Cir.), *cert. denied*, 111 S. Ct. 2034 (1991).

75. *E.g.*, Gilbert v. California, 388 U.S. 263, 266-67 (1967); United States v. Wade, 388 U.S. 218, 222-23 (1967).

76. The Supreme Court has held that compelled sobriety field tests are not barred by Fifth Amendment protection. Pennsylvania v. Muniz, 496 U.S. 582, 592 (1990). Because these tests do not infringe on a Fifth Amendment right, the suspect does not have a constitutional right to refuse to perform the tests prescribed, so a defendant's refusal to participate in such tests can be used against him in court. South Dakota v. Neville, 459 U.S. 553, 560-61 (1983). Finally, the lack of constitutional protection makes the requirement of providing *Miranda* warnings inapplicable. People v. Hager, 69 N.Y.2d 141, 142 (1987); *see also Muniz*, 496 U.S. at 583.

77. *E.g.*, Holt v. United States, 218 U.S. 245, 252-53 (1910); United States v. Walitwarangkul, 808 F.2d 1352, 1353 (9th Cir. 1986); United States v. Robertson, 19 F.3d 1318, 1322 (10th Cir. 1994).

78. *E.g.*, United States v. Valenzuela, 722 F.2d 1431, 1433 (9th Cir. 1983); United States v. Weir, 657 F.2d 1005, 1006-07 (8th Cir. 1981) (taking hair samples from beard).

The courts faced a more difficult task in drawing a distinction between compelled verbal evidence and constitutionally protected testimony.[79] In order for verbal communication to be considered testimonial, the "communication must itself, explicitly or implicitly, relate a factual assertion or disclose information"[80] that expresses "the contents of [an individual's] mind."[81] With few exceptions,[82] courts have held that the forcing of repetition of phrases, either for identification purposes[83] or to refresh a witness' memory,[84] does not constitute testimony because the compelled recitation of words or phrases by the defendant does not offer more than the physical evidence of the defendant's voice.[85] Thus, under the current court treatment of the law, the privilege against self-incrimination will generally be inapplicable to compelled evidence, including exemplars.[86]

Despite the extensive case law in this area, including multiple Supreme Court rulings denying the applicability of self-incrimination to compelled evidence,[87] defense counsel continue to challenge the current

---

79. *See* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2265, at 396 (1961).

80. United States v. Doe, 487 U.S. 201, 210 (1988).

81. *Id.* at 210 n.9.

82. *See, e.g.*, United States v. Berberian, 767 F.2d 1324, 1326 (9th Cir. 1985) (defendant protected by privilege against self-incrimination from forced repetition of testimony given in a prior suppression hearing); State v. Naylor, 70 Ohio App. 2d 233 (1980) (holding that the trial court's decision to force defendant in rape and burglary trial to repeat certain key phrases used by perpetrators during commission of the crimes was equivalent to compelling defendant to testify, and thus violated defendant's right against self-incrimination).

83. *E.g.*, United States v. Dionisio, 410 U.S. 1, 7 (1973) (grand jury order forcing suspects to record voice found not to be a violation of Fifth Amendment); United States v. Leone, 823 F.2d 246, 249-51 (8th Cir. 1987) (requiring defendant to repeat several phrases heard by police at the scene of the crime so jury could compare voice to tape recording not a Fifth Amendment violation because statements did not contain testimonial content).

84. *E.g.*, United States v. Silvestri, 790 F.2d 186, 189 (1st Cir.), *cert. denied*, 479 U.S. 857 (1986) (compelling defendant to identify himself to witness when witness forgot defendant's name not violative of Fifth Amendment because no testimonial content present within the statement).

85. The applicability of a self-incrimination protection claim to compelled voice exemplars under the "testimony" standard has been realistically foreclosed by the United States Supreme Court, which held that voice exemplars do not constitute testimony and are not protected under self-incrimination. *See Dionisio*, 410 U.S. at 7.

86. United States v. Williams, 704 F.2d 315, 319-20 (6th Cir.), *cert. denied*, 464 U.S. 991 (1983); *But see Naylor*, 70 Ohio App. 2d at 236-37 (trial court's decision to force defendant in rape and burglary trial to repeat certain key phrases used by perpetrators during commission of the crimes was equivalent to compelling defendant to testify, and thus violated defendant's right against self-incrimination).

87. Pennsylvania v. Muniz, 496 U.S. 582 (1990); *Dionisio*, 410 U.S. 1 (1973); United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Schmerber v. California, 384 U.S. 757 (1966); Holt v. United States, 218 U.S. 245

narrow formulation of the privilege.[88] To a lay person the assertion of the privilege by counsel seems to be the clear and logical defense, based on the lay person's perception that the state cannot force a defendant to speak in court.[89] Further, the "testimony" limitation placed on Fifth Amendment protection has not been universally supported, with staunch and compelling criticisms of the limitation being asserted by prominent Supreme Court Justices.[90]

Potentially, the continued zealous efforts of defense counsel to allege a self-incrimination violation will result in a reconsideration of the judicially created limitation of the privilege against self-incrimination. Beyond this, a couple of recent decisions reflect the fringe areas of the privilege that may still be asserted in the exemplar context. In particular, there are two narrow exceptions to the general trend of holding that the privilege against self-incrimination is inapplicable to compelled evidence that may apply.

The most significant exception is in the situation where the act of production of the evidence also acts as implicit testimony to an

---

(1910).

88. *See, e.g.*, Defendant's Motion for Judgment of Acquittal and New Trial at 5-6, United States v. Olvera, 30 F.3d 1195 (9th Cir.) (No. 91-1151-G), *cert. denied*, 115 S. Ct. 610 (1994); United States v. Robertson, 19 F.3d 1318 (10th Cir. 1994); United States v. Flanagan, 34 F.3d 949 (10th Cir. 1994).

89. Discussion of the topic of this article with non-legal peers was universally responded to with the assertion that the exemplar was or should be protected by the Fifth Amendment self-incrimination privilege. The general expectation was that the court could not force a defendant to say anything in court. While these discussions have no statistical reliability, they seem to reflect a common belief that a defendant cannot be forced to speak in court, regardless of technical legal standards which hold otherwise.

90. *Schmerber*, 384 U.S. at 774-76 (Black, J., dissenting) (criticizing both the lack of clarity or precision that the "testimony" distinction provides, and the failure of the Court to adhere to the broad and liberal construction that the Court had previously given the self-incrimination privilege); United States v. Mara, 410 U.S. 19, 33 (1973) (Marshall, J., dissenting) (noting that the word "testimony" is not included within the Fifth Amendment, and addressing the invasion of personality and will that a compelled voice exemplar accomplishes, stating that he could not "accept the notion that the Government can compel a man to cooperate affirmatively in securing incriminating evidence when that evidence could not be obtained without the cooperation of the suspect"). "[A voice exemplar] is the kind of volitional act—the kind of forced cooperation by the accused—which is within the historical perimeter of the privilege against compelled self-incrimination. Our history and tradition teach and command that an accused may stand mute. The privilege means just that; not less than that." *Wade*, 388 U.S. at 260-61 (1967) (Fortas, J., dissenting). Allowing the State to force the accused to repeat 'your money or your life' or words used in the commission of a violent crime like rape is intolerable under our constitutional system. *Id.*

incriminating fact.[91] For example, if the state compels the defendant to produce her copy of her tax forms, despite already having a copy, the state is using the defendant's production as implicit testimony of the authenticity of the government's copy of the tax form.[92] Voice exemplar situations in which the defendant is compelled to repeat words in Spanish or another foreign language arguably fall within this exception.[93]

There is also support for the applicability of a Fifth Amendment privilege in a situation where the court compels a person to submit to testing, from which an effort will be made to determine physiological responses through a person's ability to recall information.[94] For example, police questioning of a suspected drunk driver, which included a question regarding the year of suspect's sixth birthday, violated self-incrimination privilege because such a response proffers more than a physiological exhibition.[95] The Court distinguished the birthday question from other exemplar type situations on the basis of content. The birthday question was interpreted by the Court, in *Pennsylvania v. Muniz*, to be seeking the contents of the defendant's mind, requiring him to provide communication of information.[96] This approach is particularly applicable to compelled in-court exemplars and should be argued by defense counsel.[97]

---

91. Fisher v. United States, 425 U.S. 391 (1976).

92. *Id.*

93. Such exemplars seem to implicitly offer factual information, particularly the proficiency of the defendant to pronounce foreign language terms. This occurrence seems to fall within the standard the court applied in Pennsylvania v. Muniz, 496 U.S. 582 (1990). *See infra* note 94 and accompanying text. However, claims on this basis have been disregarded by the courts to this point. *See, e.g.*, United States v. Olvera, 30 F.3d 1195, 1198 (9th Cir.), *cert. denied*, 115 S. Ct. 610 (1994).

94. Schmerber v. California, 384 U.S. 757, 764 (1966).

95. *Muniz*, 496 U.S. 582; *see also* Gordon E. Hunt, *Fifth Amendment Limitations on the Compelled Production of Evidence*, 24 AM. CRIM. L. REV. 801, 811 (1987).

96. 496 U.S. at 598-600. The Court found this despite the obvious fact that the defendant's answer to the birthday question was not the reason that the officers asked the question. Neither the State nor the officers of the State cared when the defendant's sixth birthday was; they were asking the question solely as a tool to test the cognitive abilities of the defendant, just as they had with the other sobriety tests. *Id.*

97. It is difficult to reconcile the effect of the *Pennsylvania v. Muniz* distinction. The Court has attempted to draw a bright line, protecting the conveyance of information, but the rule ignores the dangers posed by the real results of the rule. A defendant has constitutional protection from giving completely innocuous, irrelevant answers to questions, but can be forced to repeat potentially inflammatory phrases in a courtroom. This approach was recently rejected in the Ninth Circuit. United States v. Olvera, 30 F.3d 1195 (9th Cir.), *cert. denied*, 115 S. Ct. 610 (1994). At trial, defense counsel attempted to assert that the requirement that the defendant speak in two languages constituted testimony, regardless of the content of the speech, by showing the defendant's bilingual ability. Memorandum of Points and Authorities in Support of

Thus, even though historically the application of the privilege was not realistic, the Court's adoption of the blanket exclusion of exemplars from self-incrimination protection seems to go too far. In particular, the refusal to apply the privilege does not adequately recognize the actual effect on jurors from observation of in-court statements by a defendant. While some recent expansion of the privilege against self-incrimination has occurred, the current formulation of the privilege allows the state to compel profoundly incriminating evidence from the defendant. The state benefits significantly in having access to this evidence because without a narrow rule as to what constitutes self-incrimination the state would be left to prosecute without access to many of the sophisticated evidence sources available in the twentieth century. For example, if the Court had retained the expansive view of the privilege, the state would have no access to blood, fingerprints, DNA, hair, etc. These pieces of evidence are some of the most definitive and reliable evidence sources available, and without access to any of them the state would have difficulty convicting in any case. Still, that benefit alone is not a constitutionally valid basis for the "testimony" rule. Although, realistically, the benefits were probably considered in the Court's decision to interpret the privilege narrowly. Judicial motivations aside, within the relevant legal framework in its current state, attempts to assert a self-incrimination privilege in response to court demands for a voice exemplar will not generally succeed.

II. THE APPLICATION OF DUE PROCESS GUARANTEES IN THE CONTEXT OF COMPELLED EXEMPLARS

If the Supreme Court continues to narrow the privilege against self-incrimination, the next constitutional question is whether requiring defendants to provide voice exemplars in the context of in-court identification procedures violates due process guarantees.[98] Unlike other rules of law, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances."[99] Instead,

---

Defendant's Motions at 7, United States v. Olvera, 30 F.3d 1195 (9th Cir.) (No. 91-1151-G), *cert. denied*, 115 S. Ct 610 (1994).

98. *See* United States v. Basey, 613 F.2d 198 (9th Cir.), *cert. denied*, 446 U.S. 919 (1979).

99. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

due process represents "a profound attitude of fairness between man and man" and "is compounded of history, reason, the past course of decisions and stout confidence in the strength of the democratic faith."[100] While debate continues as to whether "due process" should include substantive protections,[101] procedurally the guarantee generally acts as a "catch-all" protection, limiting the government in favor of private rights.[102] Of course, the scope of the protection tends not to be fixed, but varies according to the personality and philosophy of the Court at the time.[103]

Because of the theoretical nature of due process, determination of its applicability is fact specific and must be considered within the context of the underlying right. Compelled exemplars must be considered within the due process context of both the prohibition of overly suggestive procedures and the preservation of the presumption of innocence. Unlike the self-incrimination area, the circuit courts have split on the due process question and the Supreme Court has declined its opportunities to address the question directly.[104]

A. History

The guarantee of "due process of law" was first explicitly enumerated in statutes enacted during one of a series of reaffirmations of the Magna Carta during the fourteenth century.[105] No guidance was included regarding the specific meaning of the due process guarantee, leaving the

---

100. *Id.* at 162-63.

101. *Compare* Rosalie B. Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313 (1991) and Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941 (1990) *with* Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT 339 (1987); Timothy L. Raschke Shattuck, Note, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743 (1992).

102. RODNEY L. MOTT, DUE PROCESS OF LAW 593-94 (1973).

103. *See* VIRGINIA L. WOOD, DUE PROCESS OF LAW, 1932-1949; THE SUPREME COURT'S USE OF A CONSTITUTIONAL TOOL 272 (1951).

104. "The Supreme Court has not addressed the possible prejudicial effect of live courtroom voice identification using threatening and vulgar language in the presence of the jury. However, the circuits that have confronted the issue of a voice exemplar in the jury's presence have allowed it." Burnett v. Collins, 982 F.2d 922, 925 (5th Cir. 1993); *But see* United States v. Olvera, 30 F.3d 1195 (9th Cir.), *cert. denied*, 115 S. Ct. 610 (1994); United States v. Williams, 704 F.2d 315 (6th Cir. 1983).

105. "That no man of what estate or condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought to Answer by Due Process of the Law." STATUTE OF WESTMINSTER OF THE LIBERTIES OF LONDON, 28 Edward III, ch. iii, 1 Statutes of the Realm 345, ch. iii (1354), *printed in* MOTT, *supra* note 102, at 4 n.11.

determination to judicial and scholarly interpretation.[106] The scope of the right was primarily defined by Sir Edward Coke in the *Institutes*,[107] during the revival of the Magna Carta in the early seventeenth century. Coke's writings had a tremendous influence on the application of due process up through the early eighteenth century.[108] While Coke ascribed a substantive component to due process,[109] the actual application of due process in England in the colonial period was primarily in the context of judicial procedure.[110]

The concept of due process, along with many of the English legal rights, was transplanted to America and formally guaranteed in charters and documents of the early American colonies.[111] By the end of the seventeenth century, most of the English colonies had included guarantees of due process in their fundamental laws.[112] Many of the procedural guarantees supported by the concept of due process were explicitly enumerated within the Bill of Rights of the United States Constitution.[113] Nonetheless, "due process" was explicitly included as well,[114] alluding to a belief by the Founders in the importance of the continued protection of individuals against a potentially tyrannical or coercive government. Despite the "Anglophobia" prevalent in America after the Revolution, American courts continued to rely heavily on British precedents on issues of due process.[115] However, the courts did not adhere rigidly to criminal due process precedent, but instead

---

106. One of the most influential interpretations of the guarantee's application in England was made by Sir Edward Coke. Coke asserted that the terms "due process of law" and "the law of the land" were synonymous. This meant that due process was to include a trial's general conformity to the principles of common law, trial by jury by the peerage and lawful indictment. 2 EDWARD COKE, INSTITUTES 53 (1642), *reprinted in* MOTT, *supra* note 102, at 77-78.

107. 2 SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND (1642).

108. MOTT, *supra* note 102, at 78-83.

109. Riggs, *supra* note 101, at 959.

110. MOTT, *supra* note 102, at 83.

111. The *New York Charter of Libertyes and Priviledges of 1683* protected colonists by requiring "due Course of Law," while the 1692 *Massachusetts Bay Declaration of Rights* guaranteed "due process of law." Riggs, *supra* note 101, at 964-65.

112. *Id.* at 961.

113. For example, the privilege against self-incrimination, the right to a fair trial and the right to trial by jury are all procedural guarantees enumerated in the Bill of Rights. U.S. CONST. amends. V & VI.

114. U.S. CONST. amend V.

115. DAVID J. BODENHAMER, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY 53 (1992).

attempted to respond to their perceptions of the needs of a free society.[116] Overall, the focus of post-Revolutionary criminal law shifted emphasis from morality to concern over the protection of property and privacy. The courts' protection of procedural safeguards were central in this shift and, in the process, established definitions of due process that were readopted during the expansion of due process doctrine in the mid-twentieth century.[117]

The due process doctrine after the Civil War narrowed significantly, formally recognized by the courts, but not generally applied in support of the rights of individual defendants.[118] The progressive era movement for social justice ended this period, as courts and legislatures began another redefinition of "due process."[119]

The most significant example of this change in "due process" is reflected by the United States Supreme Court decision in *Powell v. Alabama*.[120] The *Powell* decision evidenced the Court's determination to test individual criminal cases conducted in the state courts under due process requirements and began the process of incorporating certain guarantees enumerated in the Bill of Rights of the United States Constitution as binding on the states.[121] This process continued through the 1960's, when the selective incorporation doctrine was adopted and used to essentially complete the nationalization of the Bill of Rights.[122]

B. Modern Framework

As previously noted, the Supreme Court has not addressed the circuit court dispute over a due process limitation on voice exemplars. This failure is of particular concern, considering the influence this type of evidence tends to have and the frequency of cases concerning compelled evidence of this nature.[123] Due process consideration of compelled

---

116. "'We consider it our duty,' concluded the Indiana Supreme Court in 1822, 'to give all weight to objections however nice and technical . . . but we would guard against the evil of giving too easy an ear to such as rest on mere form of words, and can have no possible bearings on the merits of the case . . . an evil which has long and justly been complained of as a disease of the law.'" *Id.* at 52.

117. *Id.* at 54-55.

118. *Id.* at 91.

119. *Id.*

120. 287 U.S. 45 (1932).

121. WOOD, *supra* note 103, at 267. *Powell* was the method by which the Court opened the door to unlimited supervision of state criminal proceedings, a practice followed regularly until 1946. *Id.* at 267-68.

122. BODENHAMER, *supra* note 115, at 104.

123. *See, e.g.*, United States v. Brown, 644 F.2d 101 (2nd Cir.), *cert. denied*, 454 U.S. 881 (1981); United States v. Domina, 784 F.2d 1361 (9th Cir. 1986), *cert. denied*,

exemplars includes two distinct, yet closely related factors. First, due process provides protection against the tainting of a witness identification by overly suggestive pre-trial and in-court procedures. Second, due process acts to prevent the infringement on the presumption of innocence to which the defendant is entitled.

1. Suggestiveness of Identification Procedures

a. Pre-Trial Procedures

The Court has addressed the tangential issue of "pre-trial suggestiveness" in the context of line-ups, and has attempted to define legal standards for what is essentially a fact specific determination. The Court originally addressed this issue in 1967 in *Stovall v. Denno*,[124] and focused on the fairness of the identification procedure under the "totality of the circumstances."[125] Soon after, the Court, in a series of cases beginning with *Neil v. Biggers*,[126] retreated from this more stringent fairness standard. Instead, the Court emphasized that the reliability of the outcome was the central determinant, focusing on the primary concern of the due process clause, which is to protect against "a very substantial likelihood of irreparable mis-identification."[127] The *Biggers* Court did not provide a bright-line definition of "overly suggestive

---

479 U.S. 1038 (1987); United States v. Olvera, 30 F.3d 1195 (9th Cir.), *cert. denied*, 115 S. Ct. 610 (1994).

124. 388 U.S. 293 (1967) (acknowledged the validity of an independent due process suggestiveness claim, but found it inapplicable based on the trial record without elaborating on the basis for the ruling).

125. *Id.* at 301-02.

126. 409 U.S. 188 (1972) (suggestive line-up at police station combined with a seven month delay between incident and identification did not pose a substantial likelihood of misidentification, based on the detailed description given by the witness and other facts supporting the validity of the identification); *see also* Manson v. Brathwaite, 432 U.S. 98 (1977) (clarifying the central importance of misidentification to the *Biggers* standard).

127. *Biggers*, 409 U.S. at 198 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)). The danger is best expressed by Justice Brennan, who notes that "[i]t is a matter of common experience that, once a witness has picked out the accused at the [pre-trial] lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practicable purposes be determined there and then, before the trial." United States v. Wade, 388 U.S. 218, 229 (1967) (quoting Williams & Hammelmann, *Identification Parades, Part I*, 1963 CRIM. L. REV. 479, 482 (1963)).

procedures," but instead defined the standard vaguely, holding that the central consideration in determining whether to exclude evidence as violative of due process is whether "under the 'totality of the circumstances' the identification was reliable, even though the confrontation procedure was suggestive."[128]

The Court reaffirmed *Biggers*' focus on reliability as the central determinant of admissibility in *Manson v. Brathwaite*,[129] and clarified the test to be applied in analyzing whether a procedure was impermissibly suggestive.[130] The "Biggers-Brathwaite" standard enacts a two-step analysis. First, the defendant must prove that the identification procedure used was impermissibly suggestive. Second, if this burden is met, the court must determine whether such suggestiveness created a substantial likelihood of irreparable misidentification. This is accomplished by balancing five enumerated factors that weigh in support of the reliability of the identification against the suggestiveness of the procedure.[131]

b. In-Court Procedures

The Supreme Court has not definitively addressed the applicability of the Biggers-Brathwaite test to the question of in-court suggestive identifications.[132] The majority position among the circuits that have considered the issue has been that the Biggers-Brathwaite pre-trial standard is not constitutionally mandated for in-court identifications.[133] Unlike pre-trial identification, in-court identifications occur in a courtroom while the relevant witness is under oath, subject to cross-

---

128. *Id.* at 199.
129. 432 U.S. 98 (1977).
130. *Id.* at 114.
131. The *Brathwaite* Court adopted five factors, first discussed in *Biggers*, as elements in consideration of reliability. These factors include: [(1)]the witness' opportunity to view the criminal at the time of the crime; [(2)]the witness' degree of attention at the time of the crime; [(3)]the accuracy of the witness' prior description of the criminal; [(4)]the witness' level of certainty when identifying the suspect at the confrontation; and [(5)]the length of time between the crime and the confrontation. Against these factors, the court must weigh the "corrupting effect" of the suggestive identification. *Id.* at 114.
132. United States v. Domina, 784 F.2d 1361, 1368-69 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987) ("[N]o holding of the Supreme Court nor of this circuit has mandated such a requirement.").
133. *Domina*, 784 F.2d at 1368-69 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987). The *Domina* court recognized that suggestiveness within the in-court identification process might require court protection, but held that such protection was within the court's discretion. *Id.* at 1369. The *Domina* court also noted that only the Eleventh circuit had indicated that the *Biggers* standard applied to in-court identifications. *Id.* at 1368.

examination, and while under close observation by the trier of fact.[134] The primary rationale behind the Biggers-Brathwaite test is to avoid the danger of an irreparable misidentification being relied on by the trier of fact. This danger is decreased significantly by the protections provided by courtroom procedures and by the presence of the jury at the procedure. The jury may consider the level of suggestiveness used as a factor to consider in gauging the reliability of the witness. These protections significantly decrease the danger of misidentification in the in-court context without having to apply the Biggers-Brathwaite pre-trial standard.

Even in those jurisdictions that recognize Biggers-Brathwaite as the required test for suggestive in-court identification,[135] the severity of the suggestiveness required to satisfy Biggers-Brathwaite leads to exclusion only in the most egregious situations.[136] These courts concur with the majority position that in-court procedures provide increased protection against over-suggestiveness from pre-trial procedures. First, neither the solitary presence of the defendant in the courtroom nor the prompting by opposing counsel lends credibility to the accuracy or objectivity of a witness' identification, and thus, neither issue poses a significant danger.[137] Second, the defendant is protected because a witness making in-court identifications does so under oath, in the presence of the trier of fact, and while subject to cross examination.[138] Third, to determine whether due process was violated, courts tend to consider all other evidence offered by the government that substantiates the element of identity, to assure that the proper identification was made.[139] As a result, the trier of fact in an in-court identification, unlike in a pre-trial procedure, is able to determine the appropriate level of reliability to be

134. *See id.* at 1368-69.

135. *See, e.g.*, Code v. Montgomery, 725 F.2d 1316, 1319 (11th Cir. 1984); State v. Jason, 392 A.2d 1086, 1089-90 (Me. 1978).

136. *See* Rosenberg, *supra* note 9, at 261; Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1 (1992).

137. *See* United States v. Anderson, 933 F.2d 1261, 1275 (5th Cir. 1991).

138. *See Domina*, 784 F.2d 1371-72.

139. The more collaborating evidence that is offered by the government, the less the danger posed by in-court identification procedures. *See* United States v. Robertson, 19 F.3d 1318, 1323-24 (10th Cir. 1994); United States v. Davila, 964 F.2d 778, 782 (8th Cir.), *cert. denied*, 113 S. Ct. 438 (1992).

placed with the identifying witness' testimony, significantly reducing any danger of suggestiveness that might have otherwise occurred.[140]

In addition, appellate courts have noted that to decrease the level of suggestiveness defense counsel may request leave to place defendant elsewhere in the courtroom or to conduct an in-court lineup.[141] Of course, the trial court's decision of such a request is entirely within that court's discretion,[142] although at least one appellate court has encouraged the use of protective procedures when feasible to do so without courtroom disruption.[143]

Despite the many protections afforded by in-court procedures, some aspects of in-court identifications pose unique and significant dangers to a defendant's due process rights. For example, unlike out-of-court lineups or other identification procedures, in-court identifications are inherently suggestive by the mere fact that the defendant is sitting at the defense table. The defendant is isolated from all other persons, as the sole focus of the government's case, when the witness is asked to identify the person she saw.[144] The nature of this situation increases the danger of false identification of the defendant[145] and may tend to misdirect the jury to overvalue untrustworthy testimony.[146] These dangers are more striking in the context of voice exemplars, as only the defendant is compelled to speak. This essentially guarantees that the witness will identify the defendant regardless of the true accuracy of that witness' recollection. The most significant protection from these dangers

---

140. United States v. Leone, 823 F.2d 246, 250-51 (8th Cir. 1987).

141. United States v. Murdock, 928 F.2d 293, 297 (8th Cir. 1991); *But cf.* United States v. Thoreen, 653 F.2d 1332, 1342-43 (9th Cir. 1981) (defense counsel's replacement of the defendant with a different person at defense table without the knowledge of the court in an attempt to increase the likelihood of faulty in-court witness identification testimony was punishable as criminal contempt).

142. The trial court's decision is subject to an abuse of discretion standard. United States v. McDonald, 441 F.2d 259 (9th Cir.), *cert. denied*, 404 U.S. 840 (1971).

143. United States v. Sebetich, 776 F.2d 412, 420-21 (3rd Cir. 1985) (while allowing an in-court lineup would have been preferable, the trial court's refusal was not an abuse of discretion requiring reversal).

144. The witness will likely look first to the defense table, where the defendant is sitting in relative isolation. Thus, the usual physical setting of the courtroom may itself provide a suggestive setting for the identification. United States v. Williams, 436 F.2d 1166, 1168 (9th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971).

145. United States v. Domina, 784 F.2d 1361, 1368 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987).

146. Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 994 (1977). However, problems of perception and memory play an even greater role in producing inaccurate information than does the use of suggestive procedures, and these cannot be overcome by cross-examination. *Id.*

is the defendant's access to cross-examination,[147] but realistically this right may not be enough to overcome the danger. Thus, continued concern over the danger of in-court identification procedures is justified, and courts should continue to minimize the dangers to the extent possible, under both the relevant evidence rules and other protections available within the discretion of the court. For example, courts could avoid suggestiveness problems by simply requiring witness identification of voice exemplars be conducted out-of-court. However, courts have tended not to adopt such protective measures in the voice exemplar context, nor have courts excluded other types of in-court identifications on constitutionally based over-suggestiveness claims except in cases of outrageous misconduct by the state.[148]

2. *Presumption of Innocence*

In essence, presumption of innocence is the constitutional guarantee that the defendant is presumed to be innocent until proven guilty and that the fact finding process must not taint this presumption.[149] While the actual effect of a particular procedure on the jurors cannot necessarily be determined, the courts must apply close judicial scrutiny to procedures that might cause "deleterious effects."[150] For example, requiring a defendant wearing a ski mask and holding a toy gun to stand up in court and shout "[g]ive me your money or I am going to blow you up" would be inconsistent with the guarantee of a presumption of innocence.[151] Presumption of innocence protection seeks to keep the trier of fact from drawing suspicions or inferences from the defendant's

147. United States v. Domina, 784 F.2d 1361, 1372 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987).

148. *Compare* State v. Jason, 392 A.2d 1086 (Me. 1978) (impermissibly suggestive to arrange in-court line-up in the presence of five-year-old child prosecutrix, remove her from the courtroom, and add defendant to line-up and then have prosecutor and court personnel "pressure" her to identify "the man that did it") *with* United States v. Murdock, 928 F.2d 293 (8th Cir. 1991) (non-detailed and inaccurate identifications by three witnesses of the defendant were held to be reliable despite fact that defendant was the only person at defense table and the only African-American in the courtroom).

149. *See* Estelle v. Williams, 425 U.S. 501, 503 (1976).

150. *Id.* at 504.

151. United States v. Olvera, 30 F.3d 1195, 1197 (9th Cir.), *cert. denied*, 115 S. Ct. 610 (1994); United States v. Brown, 644 F.2d 101, 107 (2d Cir.), *cert. denied*, 454 U.S. 881 (1981) (Oakes, J., dissenting); United States v. Domina, 784 F.2d 1361, 1374 (9th Cir 1986), *cert. denied*, 479 U.S. 1038 (1987).

arrest, indictment and presence in court, while reaching a legal conclusion based solely on the relevant legal evidence offered at trial.[152] Certain courtroom procedures have been found to violate the presumption, including requiring a defendant to wear prison clothing at trial,[153] shackling or gagging a defendant during trial without cause,[154] deploying excessive security forces in the courtroom,[155] permitting members of the court to encourage a witness to identify the perpetrator of a crime,[156] or allowing courtroom observers to wear anti-rape buttons during a rape trial.[157]

Whether compelling a defendant to restate words heard at the scene of the crime is unduly suggestive of guilt, and thus violative of the presumption of innocence, continues to be disputed among the courts. The most recent circuit court consideration of this issue was *United States v. Olvera*,[158] in which the court held that voice exemplars in general have the potential to violate due process, and that due process was violated in that particular case.[159] The court emphasized that the risk would be diminished substantially if neutral words were used.[160] The court also discussed the importance of providing the jury with a clear explanation that the exemplar was necessary for identification and had no other relevance.[161] In addition, the court noted that the defendant had exercised his Fifth Amendment right not to testify, which substantially increased the risk that the words the defendant had been forced to speak would stand out in the jurors' memories and affect the ultimate assessment of the defendant's culpability.[162] Finally, the court stated that the failure of the government to ask the witness, after the defendant's statement, whether the defendant was the same person,

---

152. John H. Wigmore, *The Presumption of Innocence in Criminal Cases, reprinted in* JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 559 (Boston, Little, Brown, & Co. 1898).

153. Felts v. Estelle, 875 F.2d 785, 786 (9th Cir. 1989).

154. Illinois v. Allen, 397 U.S. 337, 344-45 (1970).

155. Holbrook v. Flynn, 475 U.S. 560, 569 (1986).

156. State v. Jason, 392 A.2d 1086, 1089 (Me. 1978).

157. Norris v. Risley, 918 F.2d 828, 833 (9th Cir. 1990).

158. 30 F.3d 1195 (9th Cir.), *cert. denied*, 115 S. Ct. 610 (1994).

159. *Id.*

160. *Id.* at 1197 (quoting United States v. Domina, 784 F.2d 1361, 1371 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987)).

161. *Olvera*, 30 F.2d at 1197. However, the Ninth Circuit court failed to address the fact that the trial judge in *Olvera* gave a seemingly sufficient explanation to the jury, immediately after the defendant's repetition of the phrases. The judge explained that the defendant had not been forced to testify because his exemplars were not testimony and were only for the purpose of witness recollection for identification purposes. Direct Examination of Rosa Ybarra at II-27 line 18 to II-28 line 17, United States v. Olvera, 30 F.3d 1195 (9th Cir.) (No. 91-1151-G).

162. *Olvera*, 30 F.3d at 1197 (9th Cir.).

further increased the prejudicial danger.[163] Without follow-up, the defendant's statements may have appeared to the jury to be no more than a demonstration of the defendant's commission of the robbery.[164]

The *Olvera* decision forged into a rarely considered constitutional territory by its acceptance of a presumption of innocence due process claim for a compelled voice exemplar. Prior to *Olvera*, a substantial majority of jurisdictions, including the Ninth Circuit,[165] had refused to accept due process doctrine as a valid protection from compelled voice exemplars. However, these rejected due process claims were argued on suggestiveness grounds, not presumption of innocence.[166]

While defense counsel should pursue a presumption of innocence claim as a defense to compelled exemplars, the *Olvera* decision does not provide a useful framework for the assertion.[167] The North Carolina Court of Appeal, in *State v. Locklear*,[168] was the first court to consider a presumption of innocence claim based on the factors emphasized in the *Olvera* decision. The *Locklear* court ruled that no due process violation occurred because the trial court had explained to the jury the reason for requiring the defendant to repeat certain words and because the prosecutor had asked the witness, after the defendant spoke, whether that was the voice she had heard during the commission of the crime.[169]

---

163. *Id.* at 1198.
164. *Id.*
165. United States v. Domina, 784 F.2d 1361 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987); United States v. Williams, 436 F.2d 1166 (9th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971). The Ninth Circuit in *Domina* did allude to a presumption of innocence claim, but disregarded the claim without explanation. *Domina*, 784 F.2d at 1371-72.
166. *E.g.*, *Domina*, 784 F.2d 1361; United States v. Brown, 644 F.2d 101 (2nd Cir.), *cert. denied*, 454 U.S. 881 (1981); United States v. Leone, 823 F.2d 246 (8th Cir. 1987); United States v. Brown, 920 F.2d 1212 (5th Cir. 1991).
167. The *Olvera* decision is not unique in this regard. The few courts that have considered a presumption of innocence limitation to compelled exemplars have been unable to set out a workable standard. For example, the Court of Appeal in Ohio found a due process violation under facts mirroring the courtroom procedure used in *Olvera*. State v. Naylor, 70 Ohio App. 2d 233 (1980). The court did so without any direct case law in support of the due process issue. The only case law offered on due process was a general cite to the United States Supreme Court decisions in Rochin v. California, 342 U.S. 165 (1952) and Breithaupt v. Abram, 352 U.S. 432 (1957), which set out the infrequently applied "shocks the conscience" standard for due process. *Id.* at 237. In essence, the *Naylor* court sought out and reached the correct result, but did so without a clear legal framework.
168. 450 S.E.2d 516 (N.C. Ct. App. 1994).
169. *Id.* at 518-19.

Formalistically these differences may seem significant, but in actuality the realistic difference in effect on the jury's perception of the defendant's presumption of innocence is minimal.[170] The "almost Kafka-esque" scene of a defendant being forced to repeat inflammatory or threatening phrases will undermine the defendant's presumption of innocence, regardless of the efforts made to "explain" the process.[171] By forcing the defendant to utter criminal statements in court, the court isolates the defendant from all others in the courtroom and inevitably associates the defendant with the charged conduct.[172] As a result, the defendant is branded with "an unmistakable mark of guilt" in the jurors' eyes.[173]

As previously discussed, defense counsel should continue to assert presumption of innocence guarantees in their opposition to compelled exemplars. However, they should also be aware that the *Olvera* decision, while helpful and logically sound, is not fully effective in securing due process rights. The *Olvera* decision focused on formal procedural protections instead of basing the standard on a measure of the actual effect of the procedure on the defendant. By some accounts, such formalistic treatment of due process in the current United States legal system has resulted in the negation of almost all of the protection that due process was originally intended to provide.[174]

Thus, the presumption of innocence implicit in the Due Process Clause should clearly protect defendants from being compelled to repeat inflammatory or emotionally charged words under the guise of witness identification.[175] However, despite its logical application, defense counsel will likely continue to face difficulty in expanding such

---

170. "The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." Estelle v. Williams, 425 U.S. 501, 504 (1976).

171. *See* Jim Doyle, *Judge's Order to Talk Leads to Reversal*, S.F. CHRON., July 28, 1994, at A23.

172. United States v. Olvera, 30 F.3d 1195, 1197 (9th Cir.), *cert. denied*, 115 S.Ct. 610 (1994).

173. *Id.* (quoting Holbrook v. Flynn, 475 U.S. 560, 571 (1986)).

174. Rosenberg, *supra* note 9, at 261.

175. There is no sound reason why a defendant should have to repeat the same words heard at a crime scene in order for a witness to perform a voice identification. *See* United States v. Domina, 784 F.2d 1361, 1371-72 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987) ("There is no doubt that it would have been a far better procedure to have had Domina repeat neutral words . . . ."). This is particularly true of cases in which prosecutors require an exemplar despite other available methods of identification. *E.g.*, State v. Locklear, 450 S.E.2d 516 (N.C. Ct. App. 1994). At minimum, the Supreme Court should grant certiorari on this issue to provide protection against potential prosecutorial manipulation.

protection in the area of voice exemplars due to the reliance on formal procedural safeguards to protect constitutional rights.

III. OTHER POTENTIALLY APPLICABLE OPTIONS WITHIN THE CONSTITUTIONAL FRAMEWORK OF COMPELLED EXEMPLARS

A. Sixth Amendment Guarantees

The most significant area of Sixth Amendment applicability is in the context of the absence of assistance of counsel. This problem generally arises when a suspect is included in a pre-trial lineup for witness identification purposes.[176] For example, the right to counsel is guaranteed for pre-trial lineups because of "the accused's inability effectively to reconstruct at trial any unfairness that occurred."[177] In general, the determination of whether a Sixth Amendment constitutional violation has occurred depends on the court's decision of whether the lack of counsel occurred at a "critical" stage in the proceedings.[178]

The Supreme Court has held that pre-trial production and testing of physical evidence is generally not within the "critical stages" as defined under the current standard.[179] The distinction that the Court makes centers on whether a particular governmental action, taken with defense counsel absent, might derogate from the defendant's right to a fair trial.[180] Unlike out-of-court line-ups, the Court determined that only a minimal risk was posed by pre-trial compelled physical evidence as the adversarial nature of the trial system affords the defendant the opportunity to "correct" any unrepresentative sample.[181] Thus, in the Court's view, the defendant's right to a fair trial is not jeopardized by the

176. *See, e.g.*, Gilbert v. California, 388 U.S. 263, 271 (1967); United States v. Wade, 388 U.S. 218, 227-28 (1967); Catherine A. Rivlin, Note, *Showdown Over the California Showup*, 11 HASTINGS CONST. L.Q. 135 (1983).

177. *Wade*, 388 U.S. 231-32.

178. *Id.* at 227.

179. *Id.* at 227-28; *Gilbert*, 388 U.S. 267 (1967).

180. *Wade*, 388 U.S. 228.

181. The accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. *Gilbert*, 388 U.S. 267; *Wade*, 388 U.S. at 227-28. Even though pre-trial identification does not require presence of counsel, the admissibility of the evidence is still governed by and subject to the due process standard. *See* Kirby v. Illinois, 406 U.S. 682, 690-91 (1972) (plurality opinion).

absence of counsel in pre-trial production of physical evidence. However, pre-trial voice exemplar production, if conducted like a confrontational line-up, should be considered a critical stage for the same reasons as line-ups in general.[182] The distinction is between a voice exemplar merely recorded for later use and a witness identification of an exemplar at that particular time and location. The former will be allowed, just as any other taking of physical evidence; the latter probably not.[183]

Defense counsel should argue that the compelling of a voice exemplar from the defendant infringes on her right to effective assistance of counsel in two ways. First, forcing a defendant to speak as part of the state's case improperly makes the defendant a witness for the state. Second, if the court finds that the exemplar can be compelled, defense counsel should argue that a limiting instruction to the jury is a minimum requirement to protect the defendant's right to effective counsel. Still, as a general matter, this Sixth Amendment guarantee will not be a major issue in the normal in-court compelled exemplar case since defense counsel will be present to protect the defendant's rights at that time.[184]

B. Fourth Amendment Right to Privacy

The Fourth Amendment Right to Privacy protection has been applied according to a court's determination of whether a reasonable person would have an expectation of privacy against the particular state action taken.[185] The central function of the Fourth Amendment is to "protect personal privacy and dignity against unwarranted intrusion by the State."[186] The courts, primarily relying on *Katz v. United States*,[187]

---

182. *See supra* notes 124-25 and accompanying text.

183. *But see* Brown v. Harris, 666 F.2d 782, 784-85 (2nd Cir. 1981), *cert. denied*, 456 U.S. 948 (1982) (voice identification admissible at trial despite lack of the presence of counsel during pre-trial interview); United States v. Depree, 553 F.2d 1189, 1192 (8th Cir.) (no right to counsel at pre-indictment voice identification), *cert. denied*, 434 U.S. 986 (1977).

184. The effectiveness of defense counsel may still be challenged under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), if the defendant can sustain such a claim under the particular facts of the case.

185. This is a two-tier analysis. First, the court must determine whether the initial "seizure" of the person by government agents satisfied constitutional standards. *See* Davis v. Mississippi, 394 U.S. 721 (1969). Second, any subsequent search or seizure must be scrutinized under the relevant test. *See* Terry v. Ohio, 392 U.S. 1 (1968).

186. Schmerber v. California, 384 U.S. 757, 767 (1966).

187. 389 U.S. 347 (1967).

have attempted to draw the line between those aspects of the defendant that are normally open to the public and those that are not.[188]

Applicability of a *Katz* approach in a particular case is entirely fact dependant, depending on the reasonable expectation of a privacy right and the invasiveness of the particular state act in that case.[189] In general, physical characteristics, and in particular voice exemplars, are not protected because they are not private in nature.[190] Physical characteristics are continually exposed to public observation, and no expectation exists that others will not observe these features.[191] The tone and manner of a person's voice, unlike the content of a conversation, is repeatedly produced for others to hear.[192] As such, courts have deemed these to be merely identifying characteristics, not private aspects of one's person.[193] In comparison, the taking of pubic hair samples or of X-rays does infringe on an individual's legitimate expectations of privacy and would thus be subject to Fourth Amendment requirements.[194] Voice exemplars do not involve the level of intrusiveness of these latter categories and should not be barred by federal Constitutional guarantees of privacy.

In a few states, however, protection has been afforded for voice exemplars under a right to privacy guarantee under the particular state's

---

188. The essence of the distinction is the privacy expectation of an individual. *See, e.g., In Re* May 1991 Will County Grand Jury, Illinois Supreme Court v. Marquez, 604 N.E.2d 929, 934, 939 (Ill. 1992). Individuals do not have privacy expectations regarding readily observable physical characteristics, but most individuals would have the expectation that the taking of blood or hair invades their privacy. *Id.*; *see also Schmerber*, 384 U.S. at 767-69.

189. The extent of privacy guaranteed under the United States Constitution depends on the particular facts of the case. Also, state constitutions may provide broader protection of privacy, either explicitly or as interpreted by the state courts. For example, the Illinois Supreme Court held that the Illinois Constitution is broader in scope than the United States Constitution and guarantees a zone of personal privacy such that the taking of physical samples from a suspect requires probable cause. *May 1991 Will County Grand Jury*, 604 N.E.2d at 934, 939.

190. *See* United States v. Dionisio, 410 U.S. 1, 9 (1973); *Katz*, 389 U.S. at 351.

191. *See Katz*, 389 U.S. at 351.

192. "No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world." *Dionisio*, 410 U.S. at 14.

193. Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1312 n.1 (7th Cir. 1988).

194. *E.g.*, United States v. Vega-Barvo, 729 F.2d 1341 (11th Cir.) (X-rays), *cert. denied*, 469 U.S. 1088 (1984); Bouse v. Bussey, 573 F.2d 548 (9th Cir. 1977) (pubic hair).

constitution.[195] If protected by the state's privacy guarantee, a subpoena based on probable cause to take such a sample would likely be required.[196] Assertion of a privacy infringement claim by defense counsel based on a compelled voice exemplar would have to be founded in a state guarantee.

C. Other Constitutional Approaches

Other constitutional approaches have been applied to compelled production of voice exemplars and similar evidence, but have been summarily disregarded. For example, one case turned on a claim by a criminal defendant that requiring him to demonstrate his voice for identification purposes would deny him his constitutional right to a speedy trial; a claim that the court held was clearly without merit.[197] Likewise, a few cases have been considered under an equal protection analysis, though none have resulted in the finding of a constitutional violation.[198]

D. Non-Constitutional Protection

Outside of constitutional guarantees, state court evidentiary procedures generally include a probative danger balancing standard which allows trial judges, in their discretion, to balance the probative value against the prejudicial danger of a particular piece of evidence.[199] Federal rules

---

195. *See, e.g.*, *supra* note 185; CAL. CONST. art. I, §§ 1, 24.

196. *See In re* May 1991 Will County Grand Jury, Illinois Supreme Court, 604 N.E.2d 929 (Ill. 1992).

197. State v. Cary, 230 A.2d 384, 394 (N.J. 1967).

198. *See, e.g.*, Gilbert v. United States, 366 F.2d 923, 946 (9th Cir. 1966) (rejecting defendant's argument that being required to participate in lineup and voice identification denies equal protection, even though those defendants who can afford bail do not have to participate), *cert. denied*, 388 U.S. 922 (1967); Stiltner v. Rhay, 371 F.2d 420, 420-21 (9th Cir.) (requiring a suspect detained on a criminal charge to participate in a police lineup and to speak for identification purposes did not violate the constitutional guarantee of the equal protection of the law), *cert. denied*, 387 U.S. 922, *reh'g denied*, 389 U.S. 893 (1967).

199. "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (West 1996); *see, e.g.*, People v. Holt, 28 Cal. App. 3d 343, 104 Cal. Rptr. 572 (1972), *cert. denied*, 413 U.S. 921 (1973) (trial court was within its discretion to exclude from evidence exhibition that required defendant to stand, wear a hat, hold a gun and repeat the words uttered by the robber under evidence code section 352) (disapproved on other grounds in Evans v. Superior Court of Contra Costa County, 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974)); State v. Miller, 467 P.2d 683, 685 (Or. Ct. App. 1970).

provide essentially the same protection.[200]

Of course, counsel should always consider a motion under the applicable evidence code section to exclude compelled evidence and exemplars, if such a claim can be reasonably made. Exemplar evidence is not admissible as of right for either party, but is in the sound discretion of the court to permit after considering the evidence's weight, relevance, reliability, and the prejudicial danger that it poses.[201] As such, success on a suppression motion based on the applicable rules of evidence will depend on the particular facts of a case.

It would seem that a compelled voice exemplar situation would be barred in many cases under the relevant evidence standards because the production of a voice exemplar exposes the defendant to significant prejudice. First, jurors are most likely going to consider the content of the words spoken and weigh the statement as evidence, even if admonished against doing so. In fact, the admonishment by the judge might even reinforce and highlight the exemplar in the minds of some of the jurors, resulting in still more consideration being given to it during deliberations. Second, whether or not jurors consider the content, the unusual nature of the exhibition, as compared to more mundane trial practice, will likely result in the event receiving undue weight by the jurors during deliberations and may result in impermissibly swaying their decision, consciously or not.[202]

In addition, in many cases no significant probative value is offered by witness identifications of compelled exemplars. For example, in cases

---

200. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. Many states, including Colorado, Delaware, Utah and Hawaii, have adopted the text of rule 403 as enumerated. *See* 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5211 n.31 (1978 & Supp. 1995).

201. *See* People v. Williams, 559 N.E.2d 698 (N.Y. 1990), *aff'd*, 996 F.2d 1481 (2nd Cir. 1993), *cert. denied*, 114 S. Ct. 1073 (1994).

202. United States v. Olvera, 30 F.3d 1195, 1197 (9th Cir.), *cert. denied*, 115 S.Ct. 610 (1994) (When defendant exercises the right not to testify, the only statements the jurors hear from the defendant are those that mimic the words of a criminal during a crime. "[T]hese statements thus are likely to remain prominent in jurors' memories and to dominate their perception of the defendant."); Estelle v. Williams, 425 U.S. 501, 504-05 (1976) ("[T]he constant reminder of the accused's condition implicit in such distinctive, identifiable attire [prison clothing] may affect a juror's judgment . . . [and] an unacceptable risk is presented of impermissible factors coming into play.").

where alternative means of identification can and have been utilized, no benefit at all seems to be gained by use of the exemplar process. Still, courts retain the discretion to demand voice exemplars in such cases and continue to demand exemplar production, despite the redundancy in doing so.[203] Further, even in those cases where the probative value of witness identifications is high, the requirement that the defendant mimic the exact words used at the scene of the crime, instead of neutral words, does not increase the probative value.[204]

Thus, one might expect courts to routinely refuse prosecution requests for in-court compelled voice exemplars under the relevant evidentiary standard. Instead, courts often allow compelled exemplar evidence unless an infringement of constitutional magnitude is shown, presumably due to the misperception that all witness identification evidence has high probative value. So, while assertion of an evidentiary claim is crucial in the context of compelled exemplars, defense counsel must also focus on drawing their case within constitutional protections if they want to maximize their chances of avoiding a compelled voice exemplar.[205]

CONCLUSION

The clear and logical application of constitutional limitations is particularly crucial in the voice exemplar area because of both the profound effects such exemplars can have on the jury and the lack of effective non-constitutional protections against exemplars. Defense counsel have multiple constitutional options to argue, but no clear constitutional standard has yet been offered by the courts. Instead, most potential protections, both constitutional and evidentiary, have been drawn against the defendant in favor of the state, with the courts favoring the interest of the state in incarcerating criminals over the countervailing liberty interests of individuals.[206]

---

203. *E.g.*, State v. Locklear, 450 S.E.2d 516, 518 (N.C. Ct. App. 1994) (despite the witness' statement that no voice exemplar was necessary, the trial court's demand that the defendant provide an exemplar was still within its discretion); United States v. Leone, 823 F.2d 246, 250 (8th Cir. 1987) (despite fact that witness had already identified defendant, forcing defendant to repeat words uttered during the commission of the crime did not violate defendant's rights).

204. *See* United States v. Domina, 784 F.2d 1361, 1371-72 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987) ("There is no doubt that it would have been a far better procedure to have had Domina repeat neutral words . . . .").

205. Also, by raising constitutionally based objections to the use of a voice exemplar, defense counsel may convince the court not to allow the exemplar in a discretionary ruling even if no constitutional bar is found by the court.

206. *See supra* notes 6-8 and accompanying text.

As long as the Supreme Court retains the testimony versus communication distinction, the privilege against self-incrimination offers little protection in the area of compelled exemplars. The testimony standard is open to criticism, but to this point has been steadfastly adhered to by the courts.

Due process doctrine, on the other hand, should provide protection in exemplar situations. Procedurally, current treatment of exemplars seems to allow the state exemplar evidence that is denied to the defendant. Substantively, the prejudice inherent in compelled exemplar scenarios clearly has the potential to violate due process.[207] The Ninth Circuit reached the correct result in its decision in *Olvera*, but the standard set out by the court unduly emphasized formal procedural guidelines which seem to minimize the real dangers to be avoided. Likewise, other courts have generally relied on formalistic distinctions, ignoring the profound prejudicial effect exemplars can have on jurors. As a result, counsel and trial courts are left to continue to struggle with Due Process applicability on a case by case basis until the Supreme Court grants certiorari on this issue.

MICHAEL A. CONNOR

207. United States v. Olvera, 30 F.3d 1195 (9th Cir.), *cert. denied*, 115 S. Ct. 610 (1994).